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No. 02-915

In The
Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

Does the federal government have the constitutional and statutory authority to regulate isolated wetlands that lack a surface connection to the nearest stream or nearest navigable body of water?

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Defenders of Property Rights, *amicus curiae,* submits this brief in support of petitioner.[1] See Rule 37.3 of the Rules of this Court. Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Solid Waste Agency of Northern Cook County v. United States*

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no one other than *amicus curiae*

Army Corps of Engineers, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

In 1992, Petitioners Robert Krilich et al. and the Respondent United States Environmental Protection Agency entered into a Consent Decree to settle an enforcement action that respondent had brought against petitioners alleging an unlawful discharge of fill material without a permit into an isolated wetland. As part of this settlement, petitioners agreed to perform certain mitigation activities, including

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contributed financially to the preparation of this brief.

removal of spoil piles, installation of flood control structures, and creation of an off-site replacement wetland. In 1995, respondent alleged that petitioners failed to create this replacement wetland by the deadline established in the Consent Decree. The district court imposed civil penalties on Krilich for his failure to perform this remediation, *see United States v. Krilich*, 948 F. Supp. 719, 728 (N.D. Ill. 1996).

Petitioners moved to vacate the district court's original judgment in 1998, arguing that the district court lacked subject matter jurisdiction because the wetlands were "isolated intrastate wetlands" beyond the limits of the government's commerce power to regulate. The district court and the Seventh Circuit Court of Appeals rejected Krilich's argument. *See United States v. Krilich*, 1999 U.S. Dist. LEXIS 4191 (N.D. Ill. Mar. 24, 1999), *aff'd*, 209 F.3d 968 (7th Cir. 2000).

In 2001, this Court issued the decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001),

holding that the Congressional intent of the Clean Water Act (CWA) forbade the Corps from asserting regulatory jurisdiction under Section 404(a) of the Act (13 U.S.C. § 1344 (a)) over intrastate, isolated wetlands based upon the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 174. Petitioners moved to vacate the Consent Decree in light of *SWANCC*, arguing that the waters affected by the Consent Decree were not subject to the EPA's authority under the CWA. The district court and the Seventh Circuit both denied petitioners' motion. *See United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002). Petitioners now seek review from this Court.

SUMMARY OF ARGUMENT

In *SWANCC*, this Court struck down the Corps' assertion of CWA jurisdiction over isolated, intrastate, non-navigable wetlands, finding "nothing approaching a clear statement from Congress that it intended Section 404(a) [of the CWA] to reach" such wetlands. *See SWANCC*, 531 U.S.

at 174. The Corps had based its jurisdiction on the fact that the wetlands at issue served as a habitat for migratory birds. This Court held that "permitting [the Corps] to claim . . . jurisdiction over [such wetlands] falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *See id.* This Court explicitly avoided the "significant constitutional and federalism questions raised by [the Corps'] interpretation [of its own authority under the CWA]." *See id.*

Lower courts are uncertain as to what *SWANCC* means for the CWA authority of the federal government over isolated wetlands. The court below and other lower courts interpreted *SWANCC* narrowly, permitting the federal government to assert regulatory authority over non-navigable, isolated wetlands with no surface connection to "waters of the United States" as long as it does not explicitly ground its authority in the Migratory Bird Rule. *See United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002) ("[Krilich]

argues that, in *SWANCC*, the Supreme Court removed from the Corps' regulatory authority all waters that are not adjacent to bodies of open water . . . But the precise holding of *SWANCC* was not so broad"); *see also United States v. Interstate General Co.*, 39 Fed. Appx. 870 (4th Cir. July 2, 2002). Such a narrow construction of *SWANCC* leaves the federal government ample room to assert jurisdiction over isolated wetlands, ignoring this Court's concern for the traditional role of states in land and water use regulation.

The Fifth Circuit and some district courts, in keeping with *SWANCC*'s proper regard for state authority over land and water use, have interpreted the decision to create a bright-line rule limiting federal CWA authority to waters that "are actually navigable or . . . adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 265, 268-271 (5th Cir. 2001). *See also United States v Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (excluding wetlands "not directly adjacent to navigable waters" from the scope of the federal government's CWA

jurisdiction); *United States v. RMG Corp.*, 222 F. Supp. 2d 780, 788-89 (E.D. Va. 2002) (wetlands not adjacent to closest navigable waterway lay outside federal government's jurisdictional reach under CWA).

The Ninth Circuit and various district courts chart a course distinct from these two approaches, relying instead on a vague "effects" test that asks whether the wetland in question has a significant connection to, or effect upon, a navigable body of water. *See Headwaters, Inc., v. Talent Irrigation District,* 243 F.3d 526 (9th Cir. 2001) (certain irrigation canals were not "isolated" under *SWANCC* because introduction of pollutants into canals had adverse effect on waters of the United States). *See also United States v. Lamplight Equestrian Center*, 2002 U.S. Dist. LEXIS 3694, at *6 (N.D. Ill. Mar. 8, 2002) (there must be "a significant nexus" between the isolated wetlands and a navigable water to sustain federal CWA jurisdiction over the former); *United States v. Rueth Developers,* 189 F. Supp. 2d 874, 877-78 (N.D. Ind. 2002) (same); *Idaho Rural Council v. Bosma*, 143

F. Supp. 2d 1169, 1179 (D. Idaho 2001) ("sufficient [connection]" between isolated wetland and navigable water rendered the isolated wetland subject to federal CWA jurisdiction). This interpretation of *SWANCC*, like that of the court below, also leaves the federal government ample room to assert CWA jurisdiction over isolated wetlands, disregarding the role of the states in regulating land and water use.

The uncertain bounds of federal jurisdiction over isolated, intrastate wetlands impose a burden on state and local governments, who retain primary authority over land and water use. State and local governments cannot pick up the slack for wetlands protection without knowing the limits of what the EPA and Corps can do. Property owners would also benefit from a clearer division of regulatory authority over isolated wetlands so they do not face redundant or inconsistent restrictions on private economic activity they conduct on their property.

REASON FOR GRANTING THE PETITION

Guidance Is Needed By This Court To Ensure That the States' Role in Environmental Protection Is Protected.

This Court has declared that land use regulation, including wetland regulation, is traditionally a function of state and local governments. *See Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 768 n. 30 (1980) ("regulation of land use is perhaps the quintessential state activity"); *see also SWANCC*, 531 U.S. at 174 ("Regulation of land use [is] a function traditionally performed by local governments") (quoting *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994)). The court below read no meaningful limits on the federal government's CWA authority over isolated wetlands, ignoring the primary role that states and local governments play in regulating land and water use.

Although many critics express concerns about the competency of states to protect wetlands, many commentators argue that states are in fact better suited to this

task than the federal government. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 23-24 (1999) ("The ecological value of a wetland is largely a function of its characteristics and its location. This is . . . why it can be argued that state governments are better situated to conserve wetlands than federal agencies"). A clearer delineation of the limits of the federal government's CWA authority over wetlands will encourage states to further develop this competency.

Fifteen states have already enacted comprehensive wetland protection legislative schemes in order to fill the jurisdictional gap left by *SWANCC*. *See, e.g.*, Adler, *supra*, at 49; Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands* (Association of State Wetland Managers, Berne, NY) (May 31, 2001), <http://www.aswm.org/fwp/swancc/aswm-int.pdf>. Some state wetland programs are broad in reach, regulating

virtually all wetlands within the state (New Hampshire, New Jersey, Maine, and Pennsylvania). *See* Kusler, *supra*.

For example, Florida has enacted substantial legislation to protect isolated wetlands. *See* Debra Alise Spungin, Note, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 26 NOVA L. REV. 371, 383-84 (2001) ("Florida affords considerable protection to its isolated wetlands . . . [T]he statutory definition [of 'wetland'] is thus unique to Florida's local characteristics and inclusive of isolated wetlands").

State efforts to protect wetlands have borne fruit, demonstrating their competitive advantage in protecting wetlands. Under Virginia's wetland protection program begun in 1972, "alteration of wetlands dropped dramatically . . . from over 600 to 20 acres per year." *See* Adler, *supra*, at 51 (quoting Norman E. Larsen, *Wetlands Protection in Virginia—The Local Option Approach*, in WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES 251

(1985)). Maryland has had similar success with its wetland regulatory scheme, having reduced its annual wetlands losses significantly and "prevented far more wetland destruction than would occur under Section 404 alone." *See id.* (quoting Stephen R. Rubin, Note, *An Analysis of Nontidal Wetland Regulation in Maryland*, 16 VA. ENVTL. L.J. 459, 495-96 (1997)).

States like Maryland and Virginia cannot further improve their already successful wetland protection programs without knowing the limits of the federal government's authority to regulate wetlands. Only by knowing where the federal government's job ends can states know where their own jobs begin in the realm of wetland regulation. Once clear limits are established, more and better wetland protection regulatory schemes can be expected from the states.

Property owners would also benefit from this Court's guidance on these issues. Isolated wetlands account for almost two million acres out of the 100 million acres of

wetlands in the United States. *See* Adler, *supra*, at 40. Most wetland regulations, both state and federal, restrict land use, increasing the costs of corporations of siting and modifying facilities. *See id.* at 41. Without a clear demarcation of jurisdiction, state and federal authorities can cripple private economic activity on isolated wetlands by simultaneously imposing overlapping and redundant regulations. A clear dividing line would allow state and federal authorities to better divide regulatory responsibilities over isolated wetlands, while also reducing the costs of property use to property owners.

Accordingly, *amicus curiae* urges this Court to grant review of this case to determine if the court below erred in concluding that *SWANCC* did not affect the Corps' jurisdictional boundaries.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

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